No. 20,655

In the United States Court of Appeals for the Ninth Circuit

RETAIL CLERKS UNION, LOCAL 770 AFFILIATED WITH RETAIL CLERKS INTERNATIONAL ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOS ANGELES JOINT EXECUTIVE BOARD OF HOTEL & RESTAURANT EMPLOYEES & BARTENDERS UNION, AFL-CIO, INTERVENOR

On Petition to Review and Set Aside an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GLEN M. BENDIXSEN,
WILLIAM J. AVRUTIS,
Attorneys,

National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

Stat. 519, 29 U.S.C. 151 *et seq.*), to review and set aside an order of the National Labor Relations Board (R. 67),[1] issued on December 17, 1965, dismissing a complaint issued by the Board's General Counsel against The Boy's Markets, Inc. (herein called "Boy's"), Von's Grocery Co. (herein called "Von's"), and Food Employers Council, Inc. (herein called the "Council"). In its answer to the petition, the Board has requested that the petition be dismissed. This Court has jurisdiction of the proceedings, the incidents alleged to have constituted unfair labor practices having occurred in Los Angeles County, California, where the California corporations (Boy's and Von's) each operates a chain of retail stores and supermarkets and the Council, also a California corporation, bargains collectively for its employer-members engaged in the retail food market business. It is conceded that members of the Council, including Boy's and Von's, are engaged in commerce. The Board's Decision and Order (R. 62-67) are reported in 156 NLRB No. 6.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board reversed its Trial Examiner and dismissed the entire complaint. It found that when Boy's

---

[1] References to Volume I, containing the pleadings, the Board's decision and order, etc., are designated as "R."; references to reproduced portions of the testimony as "Tr."; references to the parties' exhibits as "Ex." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

and Von's entered into collective bargaining contracts with the Joint Board [2] covering their snackbar employees, no real questions concerning representation were pending by reason of alleged requests by the Clerks to represent such employees. The Board therefore concluded that neither employer had violated Section 8(a)(2) and (1) of the Act by contributing assistance and support to the Joint Board, and that therefore neither employer had violated Section 8(a)(3) and (1) of the Act by maintaining union security provisions in their contracts with the Joint Board. The Board further concluded that the Council did not illegally assist Boy's and Von's, as their agent, to encourage their respective employees to join and assist the Joint Board and to refrain from joining or assisting the Clerks and hence that the Council did not violate Section 8(a)(1) of the Act. The Board based its conclusions on the following evidentiary facts:

A. *The Clerks seek to represent Boy's and Von's snackbar employees under their multiemployer contract*

Von's and Boy's, retail grocery chains in the Los Angeles area, are members of the Council, a trade association. Since 1941, the Council, on behalf of its members, has made multiemployer bargaining agreements with the Clerks (R. 63, 31; Tr. 8, 9, 15, 16, 19-20, 332). The last contract in the series ran from January 1, 1959, through March 31, 1964. It covered all retail clerks engaged in "retail food, bakery, candy

[2] Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Unions, AFL-CIO.

and general merchandise" operations (R. 63, 31; G.C. Ex. 2). When this contract was executed, the stores of the Council's members did not have snackbars for sale of food for ready consumption on and off store premises and hence had no snackbar employees (R. 63, 31; Tr. 303-304).

Early in 1962, the Clerks' executive administrator, Lois McKinstry, noticed that snackbars were being set up in Los Angeles area supermarkets. In consequence, the Clerks told the Council that negotiations for a new multiemployer contract should include discussion of wage classifications for all the then unrepresented snackbar employees of the Council's members (R. 63, 31; Tr. 303-305).

On November 23, 1962, the Clerks, by letter, sought to have Von's recognize the Clerks as bargaining representative of Von's snackbar employees in view of the existing multiemployer contract. Specifically, the Clerks sought to confer with management regarding the fact that certain of these employees "have failed to become Local 770 members within the required time, in accordance with our agreement." The Clerks also asked in the letter that these workers "be paid according to the Retail Food Agreement" (R. 64, 32; R. Ex. 1). Von's rejected both demands, however. On December 4, 1962, Von's wrote the Clerks that the functions and duties of its snackbar employees "do not now, nor have they at any other time, come under the terms or the jurisdiction of the Retail Clerks Food Agreement" (R. 64, 32; R. Ex. 2).

Negotiations between the Council and the Clerks, for a new multiemployer contract, began in Janu-

ary 1963. The discussions included the subject of wage rates for snackbar employees on a multiemployer basis (R. 64, 33-38; Tr. 238, 240, 242, 245, 257-258, 276-277, 284-285, 389-390, G.C. Ex. 15-17, 19, 23, Jt. Bd. Ex. 10). In early December 1963, the Clerks made an unsuccessful attempt to obtain recognition as the representative of Boy's snackbar employees. At that time, C. Gus DeSilva, the Clerks' general representative, and Robert L. Madray, a field representative, called on Ida Freed, Boy's personnel manager. They told Freed that Boy's Crenshaw store's snackbar employees were "covered" by their existing multiemployer contract, and that in addition, the Clerks had gotten signed membership applications from all the snackbar employees of that store, and, in the words of Madray, "that they were negotiating for a contract" and "to not sign a contract with anybody [else]" (R. 64, 39-40; Tr. 138-141, 143, 179-181, 309, 315).[3] Freed promised to report the matter to her superiors and advise the Clerks of their decision (R. 40; Tr. 182). She also told these Clerks' representatives that Boy's would not enter into a contract with the Joint Board pending the conclusion of the still pending multiemployer negotiations between the Council and the Clerks (R. 64, 40; Tr. 140-141). Shortly afterward, McKinstry spoke to Freed by telephone and, again claiming to represent the snackbar employees, "reminded her that we were in negotiations attempting to negotiate a wage classification

[3] The Clerks had cards from five of the store's eight snackbar employees at the time (R. 40, n. 14; G. C. Exs. 4-8, 13).

and fringe benefits for these people." Freed gave her the same assurance, namely, "that she would wait untill we concluded negotiations." (R. 64, 40; Tr. 309, 318).

B. ***Boy's and Von's contract with the Joint Board with regard to their snackbar employees on a multi-store basis after card checks show the Joint Board to represent a majority of the snackbar employees in the stores of each***

Negotiations for a new multiemployer contract between the Council and the Clerks, which had begun in January 1963, were still pending at the close of 1963. On January 8, 1964, the Joint Board, on behalf of affiliated unions representing culinary workers, wrote Boy's asking recognition as majority representative of all of Boy's snackbar employees in the Los Angeles area (R. 41; Tr. 99, Jt. Bd. Ex. 7). Thereafter, a card check by an accounting firm disclosed that 17 of Boy's 21 snackbar employees employed in its 4 stores in Los Angeles County had duly designated the Joint Board as their collective bargaining representative (R. 41-42; Tr. 9, 99, 208-209, 232-233, 370, Jt. Bd. Ex. 8). Accordingly, on February 1, 1964, Boy's negotiated and entered into a contract with the Joint Board, covering all snackbar employees in these stores and containing a union security provision (R. 64, 41-42; Tr. 99, 211, 234, G.C. Ex. 9).

Von's also had snackbars in four of its Los Angeles County stores (R. 43; Tr. 98, G.C. Ex. 12). On January 10, 1964, the Joint Board wrote Von's informing it that the Joint Board represented the majority of all its snackbar employees and asking to

meet for the purposes of negotiating an agreement (R. 43; Council Ex. 3). Von's forwarded the letter to the Council, which in turn called in a public accountant who conducted a card check (R. 43; Tr. 168, 331, 335). Upon the accountant's report that 13 of Von's 23 snackbar employees had submitted authorization cards to the Joint Board, Von's entered into negotiations with that organization (R. 44; Tr. 169, 336). On March 2, 1964, the parties entered into a contract covering the snackbar employees in Von's four stores and providing for union security (R. 64, 44; Tr. 97-99, 370, G.C. Ex. 12).

On March 14, 1964, on the basis of the negotiations which had commenced in January 1963, the Council and the Clerks executed a new multiemployer contract. This agreement covered snackbar employees of employers of the multiemployer unit, except those currently under a collective bargaining agreement with the Joint Board (R. 66, 38; Tr. 128, 296-297, 389-390, Jt. Bd. Ex. 10, p. 4).

II. The Board's Conclusions And Order

The Board reversed its Trial Examiner, who had found that Von's and Boy's made bargaining contracts with the Joint Board at times when conflicting claims by a rival union gave rise to real questions concerning representation. The Board found that the claim of the Clerks, as a rival union, was clearly unsupportable and, accordingly, could not give rise to a genuine question concerning representation. The Board therefore concluded that neither Von's nor Boy's had given the Joint Board assistance such as

Section 8(a)(2) and (1) of the Act prohibits, and therefore that neither had maintained an illegal contract containing a union security provision in violation of Section 8(a)(3) and (1). Finally, the Board concluded that the Council had not illegally assisted Boy's and Von's, as their agent, to encourage their employees to join and assist the Joint Board and refrain from assisting and joining the Clerks, and hence had not violated Section 8(a)(1) of the Act (R. 62-67).

Accordingly, the Board ordered that the complaint be dismissed in its entirety.[4]

ARGUMENT

The Board Properly Determined That The Employers Lawfully Recognized And Entered Into Contracts With The Joint Board. Accordingly, The Dismissal Of The Complaint Was Proper

Von's and Boy's both entered into multi-store contracts with the Joint Board only after it had been shown that a majority of the snackbar employees at all the stores had signed cards authorizing the Joint Board to represent them. Therefore, even though the Joint Board's representative status had not been established in a Board election the two employers did what the Act requires. For, in the foregoing circumstances, "Section 8(a)(5) declares it to be an unfair labor practice for an employer to refuse to bar-

[4] As the facts were virtually undisputed, the differing inferences and legal conclusion drawn by the Trial Examiner are entitled to no special weight. *Cheney Lumber Co.* v. *N.L.R.B.*, 319 F. 2d 375, 377 (C.A. 9).

gain collectively with the representatives of his employees . . ." *United Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62, 71-72; *N.L.R.B.* v. *Geigy Co., Inc.*, 211 F. 2d 553, 556 (C.A. 9), cert. denied, 348 U.S. 821. Stated affirmatively, an employer is "under a duty to bargain with [the majority representative of his employees] and execute a contract with it if agreement [is] reached." *N.L.R.B.* v. *Kiekhaefer Corp.*, 292 F. 2d 130, 137 (C.A. 7), cert. denied, 362 U.S. 950. *N.L.R.B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 659-660 (C.A. 9). Moreover, it is the employer's duty to "do so promptly." *N.L.R.B.* v. *Corning Glass Works*, 204 F. 2d 422, 426 (C.A. 1).

In support of its contention that it was improper for the two companies to contract with the Joint Board, the Clerks rely on the principle established in *Midwest Piping and Supply Co.*, 63 NLRB 1060, which prohibits an employer from recognizing or contracting with one of two rival union claimants at a time when their claims give rise to a real question concerning representation, and requires that a union's right to be recognized first be determined under the election procedures provided in the Act. The Clerks contend that Von's and Boy's were barred from making the agreements, since the Clerks had been continuously claiming recognition as representative of Von's and Boy's snackbar employees. They further contend that the Council's participation on behalf of Boy's and Von's in the multiemployer negotiations with the Clerks, which included discussion of working conditions for snackbar employees, coupled

with Boy's alleged agreement to abide by the outcome of the negotiations, amounted to recognition of the Clerks as the representative of these employees.

However, the Clerks misconceive the principle of *Midwest Piping*. That principle imposes a duty of neutrality pending a Board election where an employer is faced with conflicting valid claims of two or more rival unions. However, not every union claim of itself is sufficiently valid to require the employer's neutrality. Not even the filing of a formal representation petition by one of the unions will necessarily make recognition and contracting with the other unlawful. As the Board pointed out (R. 65), the rival claim must be of a nature which gives rise to "a real question" concerning representation. It is uniformly held that "an employer does not violate the Act by extending recognition to one of the competing unions where the rival union's claim is clearly unsupportable or specious, or otherwise not a colorable claim. In such circumstances, there is no real question concerning representation of employees." *Iowa Beef Packers, Inc.* v. *N.L.R.B.*, 331 F. 2d 176, 181-184 (C.A. 8); *N.L.R.B.* v. *Swift & Co.*, 294 F. 2d 285, 287-288 (C.A. 3); *Kiekhaefer, supra*, 292 F. 2d at 137; *N.L.R.B.* v. *Wheland Co.*, 271 F. 2d 122, 124 (C.A. 6); *Cleaver-Brooks Mfg. Co.* v. *N.L.R.B.*, 264 F. 2d 637, 642 (C.A. 7), cert. denied, 361 U.S. 817. Contrast, *N.L.R.B.* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 922 (C.A. 9); *N.L.R.B.* v. *Signal Oil and Gas Co.*, 303 F. 2d 785, 787 (C.A. 5).

The Clerks never presented a supportable claim to represent the snackbar employees of either Boy's or

Von's, and so there was never a real question concerning representation. It is undisputed that the Clerks neither had nor claimed to have authorization cards from any snackbar employees at Boy's or Von's total of eight stores involved, except for those at Boy's Crenshaw store (R. 66, 39; Tr. 234, 293, 315, 322, 326, 343, 377, 378, 392). Thus, their claim that they represented all the snackbar employees on a multi-store basis was based essentially on the 1959 multi-employer contract with the Council, which covered Von's and Boy's stores. (R. 66; Tr. 293, 315, 322, 377-378, 382, 384-385, 391-392). However, the Board reasonably found that that contract, made in 1959 when there were no snackbar employees, and omitting to provide for them concerning wage rates or in any other respect, did not cover such workers (R. 66; Tr. 341-343). In 1963, in a case involving the *same* contract and another employer in the Council, the Board also reached this conclusion, *i.e.*, that the agreement never contemplated or covered snackbar employees. *Piggly-Wiggly*, 144 NLRB 708, 709-710, (See Tr. 315-317, 404). Thus, the Clerks, which had no standing as the snackbar employees' majority representative by virtue of the 1959 contract, surely had none by virtue of merely the 5 cards secured from employees at one of Boy's stores.

The Clerks now contend (Br. 21) that since they presented a card-backed claim at one of Boy's stores, the Board should have held that a colorable claim had been raised for representation on a single store basis, consistent with the holding in *Piggly-Wiggly* "that a valid claim for representation had been made within

a presumptively appropriate single plant unit." However, in that case, in 1963, a union was seeking an election to represent the snackbar employees of a single store in the Council. The Clerks unsuccessfully tried to block the election proceeding on the same ground that was rejected here, *i.e.*, that the newly-acquired snackbar employees of the Council members were covered by the 1959 multiemployer agreement. The Board simply held that the presumptive appropriateness of a single store unit had not been overcome, since the petitioning union sought *only* this smaller unit and the employees were unrepresented on any basis. *Piggly-Wiggly, supra,* 144 N.L.R.B. at 710.

In the instant case, however, no question of representation was raised involving a single store unit. This is revealed in both the Clerks' own testimony and their arguments in the Board proceeding. As set forth *supra,* pp. 3-7, in November 1962 the Clerks claimed to represent the snackbar employees at *all* of Von's stores involved by virtue of the 1959 multiemployer contract, and Von's flatly rejected the claim. Similarly, in the 1963 multiemployer negotiations with the Council the Clerks' attempt to include the snackbar employees in the new contract's coverage was based wholly on the assertion "throughout the discussions that take-out bar employees were covered by the . . . Clerks' agreement" (R. 33-38; Tr. 257). As the Board noted, with this background the Clerks' December 1963 assertion of authorization cards from snackbar employees at Boy's Crenshaw Store alone was clearly in furtherance of its "larger and encompassing claim to represent all the snackbar em-

ployees on a multiemployer basis . . . and Boy's so understood" (R. 66). Thus, Clerks' officials told Boy's that snackbar employees were "covered" on a multi-store basis under the 1959 multiemployer agreement still in effect, and that the Council and the Clerks "were in negotiations attempting to negotiate a wage classification and fringe benefits for these people." (Tr. 180, 309). A multi-store claim only was clearly imparted to Mrs. Freed, the Boy's official, who told the Clerks "that while the Culinary [Joint Board] had contacted the people, there would be no contract signed" because of the negotiations with the Council (Tr. 309).[5]

When the Joint Board successfully organized Boy's and Von's snackbar employees in January of 1964, it was entirely on the basis of multi-store units. No contention was raised that those employees could not appropriately be represented on that basis. Indeed, Boy's and Von's both entered into multi-store contracts with the Joint Board on, respectively, February 1 and March 1, 1964. Additionally, when the Clerks and the Council later executed a new multiemployer agreement on March 14, it sought to establish terms of employment for snackbar employees on a multi-store basis and gave no indication that the

---

[5] Significantly, the Clerks state in their brief, (p. 6) that, "three officials of the Retail Clerks testified that they informed the personnel manager of Boy's that a majority of the employees in the snackbar of the Crenshaw store had signed authorization cards, that it was a *combination operation being included in the current Clerks-Council contract negotiations* . . ."

Clerks were seeking to represent only the Crenshaw store employees. To the contrary, the contract purported to extend multi-store coverage to all snackbar employees except, *inter alia*, "persons presently under a collective bargaining agreement with Culinary Workers Union [Joint Board] . . ." (R. 66, 38; Tr. 128, 296-297, 389-390, Jt. Bd. Ex. 10, p. 4).

In sum, the undisputed facts contain no suggestion that any union was seeking representation of a single store unit. Accordingly, the Clerks' assertion that the authorization cards they procurred at a single store in Boy's chain constituted a colorable claim for representation, which barred Boy's and Von's from honoring the Joint Board's authenticated majority claim in multi-store units, is wholly without substance. Compare, *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245, 248 (C.A. 2); *Retail Associates, Inc.* 120 *N.L.R.B.* 388, 392, 394; *Bell Bakeries of St. Petersburg, Etc.*, 139 N.L.R.B. 1344, 1346, 1350-1351; *Scougall Rubber Mfg. Co., Inc.* 126 NLRB 470, 472; *Neville Foundry Co., Inc.*, 122 NLRB 1187, 1190.

The Clerks' further contentions have no merit. Neither Von's nor Boy's was bound by any alleged Council recognition, during the 1963 multiemployer negotiations, of the Clerks as the representative of their snackbar employees. It does not appear that either employer authorized the Council to represent it in bargaining for these employees. When the Joint Board requested recognition from Von's and Boy's in January of 1964, the Council supplied accountants to verify that the Joint Board represented the two employers' snackbar employees. However, this was

consistent with a view that the Joint Board could be the employees' selected representative, and not that the Clerks' representative status had been recognized in the multiemployer negotiations. In any event, the Clerks may scarcely make this contention. As shown, *after* Von's and Boy's recognized and executed agreements with the Joint Board, the Clerks willingly executed a new multiemployer agreement with the Council which effectively excluded these two employers' snackbar employees from its coverage.

Finally, the Clerks may not rely on Mrs. Freed's assurance that Boy's would not enter into a contract with the Joint Board pending conclusion of the current negotiations between the Clerks and the Council. As the Board pointed out (R. 66-67), neither Boy's nor Von's were entitled to withhold recognition from the Joint Board once it had established its majority, absent a rival claim which would itself raise a real question concerning representation. As the Clerks had no support for such a claim, the Act imposed an immediate obligation to deal with the chosen representtive of the snackbar employees, which supervened any alleged undertaking not to do so. See cases cited *supra*, p. 9.[6]

In sum, in view of the failure of the Clerks, by any of their claims, to raise a real question concerning representation there was no lawful obstacle to Boy's and Von's entering into the contracts with the Joint

---

[6] For the above reason, election cases cited by the Clerks (Br. 32), where the bargaining obligation in an appropriate unit had not been established by authorization cards, are totally inapposite.

Board, and the conduct of each employer was entirely lawful. It further follows that the Council did nothing wrongful in assisting either of these employers in determining that recognition of the Joint Board was required. Consequently, the Board's dismissal of the complaint was proper.

CONCLUSION

Accordingly, it is respectfully submitted that the petition to review the Board's order should be dismissed.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GLEN M. BENDIXSEN,
WILLIAM J. AVRUTIS,
Attorneys,

National Labor Relations Board.

June 1966.

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 221562 888